(3)

No. 03-1032

IN THE

SUPREME COURT OF THE UNITED STATES

COUNTY OF HUMBOLDT, *et al.*,

Petitioners,

v.

HEADWATERS FOREST DEFENSE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY
AND
MOTION FOR SUMMARY DISPOSITION

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PETITIONERS' REPLY AND MOTION FOR SUMMARY DISPOSITION

MOTION FOR SUMMARY DISPOSITION (Rule 16.1)

Under Supreme Court Rule 16.1, based upon the *Petition for Writ of Certiorari, Respondents' Brief in Opposition* and *Petitioners' Reply and Motion for Summary Disposition* submitted herewith, defendants move for an order of summary disposition on the merits, reversing the order of the Ninth Circuit and reinstating the District Court orders denying recusal (Petition, Appendix D) and denying change of situs of trial (Petition, Appendix E).

REPLY BRIEF

OVERVIEW – QUESTION REVISITED

As now distilled by plaintiffs' opposition, the question is: Do parties to a federal proceeding have a right to a fair trial under accepted rules of jurisprudence, or should the federal court system become a forum for political theatre?

I.
THE OPPOSITION CONFIRMS THAT THE NINTH CIRCUIT'S WRIT WAS AN UNPRECEDENTED DEPARTURE FROM WELL-ESTABLISHED FEDERAL JURISPRUDENCE.

As set forth in the Petition for Writ of Certiorari, the issuance of a writ to recuse a district court judge based on

a judicial ruling represents a completely unprecedented departure from established federal jurisprudence. It has been held time and time again that, without something more, judicial rulings cannot support recusal.

Plaintiffs' opposition offers no authority or even argument to the contrary. The only authority cited in the opposition on the issue of recusal is this Court's decision in *Liteky v. United States,* 510 U.S. 540 (1994). *Liteky* provides absolutely no support for the Ninth Circuit's unprecedented recusal order. The *Liteky* court unanimously agreed that neither the admonitions nor trial rulings below provided sufficient grounds for disqualification of the district court judge. Although the court left open the possibility that "in the rarest circumstances," a judicial ruling could provide the basis for recusal, a ruling must "display deep-seated and unequivocal antagonism that would render fair judgment impossible." To illustrate such a circumstance, the court cited a statement by a district court judge in a World War I espionage case that "one must have a very judicial mind, indeed, not [to be] prejudiced against the German-Americans" because their "hearts are reeking with disloyalty." *Id.*, at 555.

Liteky instructs that "bias or prejudice" connotes "a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess. . . or because it is excessive in degree." *Id.*, at p. 550.

Plaintiffs offer not one scintilla of evidence which would support a claim that Judge Walker's decision to hold trial in Eureka, where virtually all of the parties reside and the incidents occurred, demonstrated bias or

prejudice, let alone "deep-seated favoritism or antagonism." Nor do plaintiffs take issue with Judge Hamilton's independent review of plaintiffs' recusal motion, and the failure of the panel to consider that decision below, which states: "Plaintiffs provide no evidence of any deep-seated favoritism or antagonism that stems from an extrajudicial source, and have not established that there is a reasonable question as to whether Judge Walker has a wrongful or inappropriate predisposition toward plaintiffs." Nor do plaintiffs challenge or question Judge Walker's complete discretion under 28 U.S.C. § 1404(c) to order the action to be tried "at any place within the division in which it is pending."

The complete failure of plaintiffs' opposition to cite any evidence or authority which would call into question the appropriateness of Judge Walker's order confirms that it cannot possibly provide the basis for recusal.

Similarly, plaintiffs' opposition provides nothing which would excuse the panel's disregard for well-established mandamus review standards. Indeed, plaintiffs acknowledge that the panel issued its writ "in violation of normal rules governing grants of extraordinary relief. . ." Opposition, p. 10. Plaintiffs do not take issue with the legion of cases holding that mandamus is a "drastic" and "extraordinary" remedy requiring the moving party to satisfy the burden of showing a "clear and undisputable" error. That the panel ignored this standard is clear on the face of the memorandum decision, which assigns no legal error whatsoever to any decision by Judge Walker.

Rather than providing legal or evidentiary support for the merits of the panel's recusal writ, plaintiffs attempt to down-play the writ as an "administrative" or "mere housekeeping" matter. Opposition, pp. 6, 13. As instructed by this Court, the rigorous standards applied to

writs are served by "the undesirability of making a district court judge a litigant and the inefficiency of piecemeal appellate litigation." *Mallard v. United States,* 490 U.S. 296, 309 (1989), citing *Kerr v. United States,* 426 U.S. 394, 402-403 (1976), *Applied Chemical Corp. v. Diaflon, Inc.,* 449 U.S. 33, 35 (1980).

The complete and total usurpation of Judge Walker's unquestioned authority to hold the trial in Eureka by the panel order issued three days before trial, and the subsequent writ to recuse Judge Walker cannot reasonably be characterized as a "mere housekeeping" matter.[1]

II.
THE OPPOSITION CONFIRMS THAT THE WRIT BELOW ADVANCES PLAINTIFFS' BLATANTLY POLITICAL AGENDA.

The beginning and end of the legal issue in this case is whether or not law enforcement officials authorized the use of reasonable force under Fourth Amendment standards to overcome resistance to lawful arrests. In spite of this uncontrovertable state of affairs, plaintiffs continue to attempt to manipulate the judicial process to serve their openly political agenda.

The opposition confirms plaintiffs' intent to stage a "political trial," and their desire for an "international forum" in San Francisco. Opposition, p. 5. The opposition

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[1] The claim of plaintiffs that defendants "have managed to pointlessly and expensively drag out the proceedings in two courts below for years" is curious given that this case entered the appellate arena by plaintiffs' appeal following trial, and again following plaintiffs' petition for writ of mandamus to recuse Judge Walker, filed six days before commencement of the second trial.

goes so far as to state that the underlying "strategy and tactics" of the plaintiffs is "to stop or impede the corporate raiders slaughter of the redwoods and the whole forest land."[2] Opposition, p. 11.

The opposition confirms that plaintiffs' refusal to submit to lawful arrests in the underlying incidents was staged in furtherance of the openly political EarthFirst! movement. Opposition, p. 4.

These admissions underscore the misappropriation of judicial process in this litigation, which has now resulted in the unprecedented recusal of a district court judge and transfer of this case to plaintiffs' chosen "international forum."

Following trial, in the order granting defendants' Rule 50 motion, Judge Walker correctly noted that, in each incident, "plaintiffs were part of a large group of protesters operating in an organized and concerted effort..." In analyzing the governmental interests at stake, the district court invoked *Bray v. Alexandria Women's Health Clinic*, 406 U.S. 263 (1993), which states that "the wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protests, organized, premeditated lawlessness menaces in a unique way the capacity of a

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[2]It is the position of plaintiffs that is an affront to the First Amendment – the notion that their cause entitles them to special treatment by law enforcement and justifies making a "Big Top" out of a federal forum. Defendants would also (see Opposition, p. 7, fn. 3) welcome an opportunity to submit videotapes of the entire incidents for review by this Court. Defendants remain confident that a jury will determine that the transient discomfort of pepper spray presents a far more reasonable alternative to overcome plaintiffs' resistance to lawful arrests than requiring officers to risk injury to plaintiffs and themselves by cutting through twenty-five pounds of steel encasing a human limb.

State to maintain order and preserve the rights of its citizens." *Id.*, at p. 287.

In appealing the Rule 50 order, plaintiffs downplayed the governmental interests involved by claiming that there was no evidence that the incidents were part of a large-scale protest. This characterization was adopted by the Ninth Circuit panel in reversing the district court. See, *Headwaters Forest Defense v. County of Humboldt,* 240 F.3d 1185, 1201 (9th Cir. 2000) (". . . there is no evidence supporting the notion that the police needed to use pepper spray in this case to 'maintain order and preserve the rights of its citizens' against a 'large group' of 'lawless' and 'menacing' protesters." Quoting, *Bray,* 506 U.S. at 287.).

The opposition here now makes it abundantly clear that the district court accurately characterized the circumstances facing law enforcement and exposes the previous efforts by plaintiffs to mislead the appellate court.[3]

Plaintiffs have thus far succeeded in holding law enforcement officials hostage for five years in what can fairly be described as a propaganda suit. If the Ninth Circuit's recusal writ is allowed to stand, a district court judge will fall victim to the same abuse of the judicial process.

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[3] Reiterating the panel's parroting of the statement of plaintiffs that the trial situs choice was made *sua sponte* is yet another example of this. Plaintiffs' counsel acknowledges being new to the case. Opposition, p. 10. Defendants' counsel provided a sworn declaration regarding the efforts to arrange for trial in Eureka before the *first* trial. Petition, Appendix D, pp. 12a-13a, fn. 3. No suggestion to the contrary has been heard from the attorneys representing plaintiffs at that time.

III.
SUMMARY REVERSAL IS WARRANTED.

Defendants are keenly aware that circumstances warranting the expenditure of this Court's resources to correct erroneous appellate decisions are exceedingly rare. Nevertheless, defendants submit that the writ of mandamus issued below has "so far departed from the accepted and usual course of judicial proceedings" as to warrant this Court's supervisory power pursuant to Rule 10.

Furthermore, it is respectfully submitted that this is also a case warranting a summary reversal pursuant to Rule 16. See, e.g., *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (granting summary reversal and stating that "summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law."); *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) (granting summary reversal, explaining that the fact that the Court of Appeals' opinion was unpublished, and apparently of no precedential effect, "carries no weight in our decision to review the case."); *Hetzel v. Prince William City*, 523 U.S. 208 (1998); *U.S. v. Indrelunas*, 411 U.S. 216, 218 (1973) ("consideration of the petition for certiorari and the response has led us to conclude that further briefs and oral arguments would not materially assist in our disposition of the case. . ."); *Stewart v. LaGrand*, 526 U.S. 1001 (1999); *Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997) (stating that "the court of appeals' decision is also contradicted by our repeated statements in past cases – none of which was so much as cited by the court of appeals, despite the district court's discussion of two of them – that the performance of abortions may be restricted to physicians."); *County of Los Angeles v. Kling*, 474 U.S. 936 (1985) (summary reversal of un-

published, non-citable opinion); *Stone v. Graham*, 449 U.S. 39 (1980); *Idaho Dep't of Employment v. Smith*, 434 U.S. 100 (1977); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975).

The justification for summary reversal is supported not only by the degree of departure from established jurisprudence on the merits, but also by the Ninth Circuit panel's use of an unpublished memorandum and its subsequent refusal to circulate the decision for *en banc* consideration. By its very nature, the issuance of a writ of mandamus is a drastic judicial remedy, intrinsically warranting evaluation and review. The issuance of a writ to recuse a district court judge should only heighten the justification for not only a published opinion, but *en banc* consideration. The opinions of federal courts "should contain reasoned explanations of their decisions to lend them legitimacy, permit public evaluation, and impose a discipline on judges." Wald, P., Judge, United States Court of Appeals for the District of Columbia Circuit, The Problem With Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?, 42 Md. L. Rev. 766. Unpublished memorandum decisions "should be reversed for cases in which the issues involve the application of existing rules of law to a standard fact situation, and in which there is no reason for qualifying the settled rules." *Id.* See also, Mandell, J., Trees That Fall In the Forest: The Precedential Effect Of Unpublished Opinions, 34 Loy. L. A. L. Rev. 1255.

The issuance of an order halting an imminent trial and subsequent writ removing a District Court Judge cannot be fairly described as a "standard fact situation." As set forth in defendants' Petition, a review of the entire history of judicial decisions reveals that no judge has

ever been removed from a case because of a judicial ruling. These unprecedented judicial actions warranted exposure and evaluation by way of a published opinion. It is telling that the panel chose to withhold the writ from publication and *en banc* exposure when all of the panel's previous decisions in this case have been published and circulated for *en banc* consideration.

The use of unpublished memorandum decisions to decide important or controversial issues threatens the integrity of the judicial process and tempts abuse. See e.g., *Kling*, 474 U.S. at 938 (Stevens, J., dissenting) ([The Ninth Circuit's] decision not to publish [its] opinion or permit it to be cited – like the decision to promulgate a rule spawning a body of secret law – was plainly wrong."); *U.S. v. EDG Broadcasting Company*, 509 U.S. 418, 424, n. 3 (1990) ("We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion."); Mandell, J., 34 Loy. L. A. L. Rev. at 1264 ("The prospect of judges exercising broad discretion under the auspices of limited publication in order to sweep difficult issues under the rug by inappropriately designating an opinion unpublished is frightening,"); Posner, R., The Federal Courts, Crisis and Reform 122 (1985) (Noting that "the unpublished opinion provides a temptation for judges to shove difficult issues under the rug, in cases where a one-liner would be too blatant an evasion of judicial duty").

CONCLUSION

For all of the above reasons, petitioners submit that the panel's order warrants supervisory intervention by this Court, and specifically request that the Court (1) grant certiorari, (2) summarily reverse the order of the Ninth Circuit panel,and (3) reinstate the District Court orders denying recusal (Petition, Appendix D) and change of situs of trial (Petition, Appendix E).

Respectfully submitted,

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